

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

FCC No. 95-334

In re Application of	)	
Alascom, Inc. AT&T Corporation	)	
and Pacific Telecom, Inc.	)	
For Transfer of Control of	)	File No. W-P-C-7037
ALASCOM, Inc.	)	<u>et al.</u>
from Pacific Telecom, Inc.	)	
to AT&T Corporation	)	
	)	
and	)	
	)	
Application of Alascom, Inc.	)	
For Review of Authorization	)	File No. W-P-C-6520
to Acquire and Operate a Fiber Optic	)	
Cable System between Alaska and	)	
Oregon for the Provision of	)	
Interstate Switched and	)	
Private Line Services	)	

**ORDER AND AUTHORIZATION**

**Adopted:** August 1, 1995

**Released:** August 2, 1995

By the Commission:

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## I. INTRODUCTION

1 Before the Commission is the above-captioned Application for Transfer of Control of ALASCOM, Inc.(Alascom) from Pacific Telecom, Inc. (PTI) (the parent company of Alascom) to AT&T Corporation (AT&T) filed jointly by Alascom, Pacific and AT&T (Applicants) on December 15, 1994. Applicants specifically request that the Commission approve transfer of control of Alascom's current domestic and international authorizations, cable landing license, radio licenses, and radio permits to AT&T. Applicants additionally request that the Commission issue a

finding pursuant to 47 C.F.R. §62.1 et seq. that, after closing the transaction, "AT&T/Alascom" and AT&T Communications will be commonly owned by AT&T and may, therefore, share common officers and directors.<sup>1</sup> Applicants further request a waiver of Section 61.41(c) of the Commission's Rules, the "all or nothing rule," which would otherwise require AT&T/Alascom to provide services under price cap regulations. Finally, Applicants request that transfer of Alascom's Section 214 authorizations under the terms of the proposed acquisition constitutes compliance with the Commission's requirement that, by March 1, 1995, AT&T file a Section 214 application to serve Alaska.<sup>2</sup>

2 Also before the Commission and implicated in the proposed

<sup>1</sup> Application at 12. Applicants assert that after the transfer AT&T Corporation will own all of the stock of Alascom and a majority of the stock of the entities comprising AT&T Communications.

<sup>2</sup> See Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Memorandum Opinion and Order, 9 FCC Rcd 3023 (1994)(Market Structure Order) at 3032, para. 50. The Application was placed on public notice on January 6, 1995. On February 6, 1995, United Utilities, Inc., (United) and Alaska Telecom, Ltd., L.C. (Alaska Telecom) filed Petitions to Deny the Application (Petitions). Also on February 6, General Communications, Inc. (GCI) filed Comments. An Opposition to the Petitions to Deny was filed by Applicants on February 22 (Applicant's Reply). Replies were filed by GCI, United and Alaska Telecom on March 6, 1995. On March 31, 1995, the Alaska Public Utilities Commission (APUC) issued a Bench Order Approving Application Subject to Conditions, U-94-113 Order No. 2 (Bench Order), approving the Applicants' request for transfer of the ownership of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corp. On June 13, 1995, APUC issued an Order Affirming Bench Order, U-95-113 Order No. 3 and U-95-26 Order No. 1 (APUC's First Order) detailing the rationale of APUC's Bench Order. On June 15, 1995, APUC issued an Order Addressing Issues, Identifying Reporting Requirements, and Requiring Filings, U-95-26 Order No. 2 (APUC's Second Order) requiring quality of service reports from AT&T and Alascom to ensure that the transfer of ownership of Alascom did not affect quality of service. Also on June 15, 1995, APUC issued an Order Granting Motion to File Response; Approving Use of Assumed Business Name; and Requiring Filing, U-94-113 Order No. 4, allowing Alascom to use the name "AT&T Alascom." APUC's First Order defers to the Commission issues relating to interstate telecommunications. Nothing in APUC's orders is inconsistent with our findings here.

transfer is an application filed by Alascom for review of a 1991 Common Carrier Bureau Decision<sup>3</sup> authorizing Alascom to acquire and operate a fiber optic cable system between Alaska and Oregon for the provision of interstate switched and private line services (Application for Review).<sup>4</sup>

3 In the present Order, we find that the effect of the proposed merger will not substantially lessen competition, or tend to create a monopoly. We find that the acquisition, as conditioned herein, will promote entry into the Alaska telecommunications market. We find that it will promote telecommunications efficiency and that it conforms to the objectives and requirements of the Joint Board's Final Recommendation<sup>5</sup> as adopted in the Market Structure Order. We also find that the language retaining Commission jurisdiction over the Alaska Spur in the Alaska Spur Authorization does not provide the Commission with any powers other than those Alascom has acknowledged and accepted in its Application for Review. To the extent of this clarification only, Alascom's Application for Review is granted.

## II. BACKGROUND

4 The JSA: Interstate telephone service to and from Alaska is provided jointly by AT&T and Alascom under their Joint Services Agreement (JSA). Alascom connects directly to local exchange carriers in Alaska and to AT&T in the contiguous 48 states. Under the JSA, AT&T must reimburse Alascom for all of Alascom's unrecovered interstate costs plus a profit margin equal to AT&T's. AT&T and Alascom provide interstate service in Alaska

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<sup>3</sup> In the Matter of Application of Alascom, Inc. for Authority to Acquire and Operate a Fiber Optic Cable System between Alaska and Oregon, for the Provision of Interstate Switched and Private Line Services, Memorandum Opinion, Order and Authorization, 6 FCC Rcd 2969 (1991) (Alaska Spur Authorization).

<sup>4</sup> An Opposition to the Application for Review (Opposition) was filed by General Communication, Inc., (GCI). A Reply was filed by Alascom. Alascom also filed a Motion for Waiver of Page Limitation to permit its Application to exceed the Commission's 25 page limit. We grant the waiver because Alascom has demonstrated a need for the waiver and thus good cause has been shown.

<sup>5</sup> Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Final Recommended Decision, 9 FCC Rcd 2197 (1993) (Joint Board's Final Recommendation).

generally pursuant to AT&T's nationwide averaged rate schedule (i.e., at "integrated rates"). Alascom's role in the Alaskan market and under the JSA is limited to the provision of interstate interexchange transport and switching services necessary for interexchange carriers to provide services in Alaska up to the point of interconnection with each Alaska local exchange carrier.<sup>6</sup> Finally, under the JSA, rates charged to MTS and WATS customers in Alaska must generally remain equivalent to rates charged for calls of comparable distances in the contiguous 48 states.

5 Given the sparse population and vast distances involved in the Alaskan telecommunications market, Alascom's required compensation and rate of return under the JSA have proved burdensome to AT&T. Alascom gains an advantage over its interstate and intrastate service competitors because, in AT&T, it has an assured revenue source, regardless of Alascom's level of efficiency and irrespective of existing market conditions. For these reasons, a Federal-State Joint Board, pursuant to Section 410(c) of the Communications Act, concluded, and the Commission agreed, that the JSA did not promote competition and efficiency in the Alaskan market.<sup>7</sup> The Commission determined that the JSA should be abandoned, "subject to transition mechanisms that will enable the new market structure to develop without causing significant rate increases in Alaska."<sup>8</sup>

6 The Market Structure Order: The Joint Board's Final Recommendation was released on October 29, 1993. With minor changes, it was adopted by the Commission in its Market Structure Order of May 19, 1994. The recommendation of the Joint Board, as adopted, requires implementation of a new telecommunications market structure for Alaska designed to preserve universal service, continue rate integration, maintain revenue requirement neutrality, allow market-based competitive entry, and encourage increased efficiency in the provision of telecommunications services.<sup>9</sup> The Market Structure Order requires termination of the

<sup>6</sup> Market Structure Order, 9 FCC Rcd at 3023.

<sup>7</sup> Market Structure Order, 9 FCC Rcd at 3024; Joint Board's Final Recommendation, 9 FCC Rcd at 2200.

<sup>8</sup> Market Structure Order, 9 FCC Rcd at 3025.

<sup>9</sup> Id. at 3023. Rate integration in Alaska requires AT&T and Alascom to provide interstate service in Alaska generally pursuant to AT&T's nationwide average rate schedule. Revenue requirement neutrality requires that the recommended changes in Alaska's telecommunications market structure do not materially increase Alaskan intrastate revenue requirements.

JSA on January 1, 1996.<sup>10</sup>

7 Transition Mechanisms: The Commission decided that termination of the JSA should be delayed until January 1, 1996. After termination, Alascom's common carrier services must be offered to interexchange carrier customers under tariff on a nondiscriminatory basis at rates that reflect the costs of services, with separate rate schedules for remote "Bush" locations not subject to competition.<sup>11</sup> After the JSA terminates, Alascom could offer interstate MTS independently from AT&T with no obligation to charge AT&T's integrated rates. The recommended market structure contemplates that Alascom would continue to provide private line service upon reasonable request under its existing federal tariffing and Section 214 obligations. After termination of the JSA, AT&T is required to provide northbound and southbound MTS between Alaska and the other states at integrated rates. If AT&T provides private line service between Alaska and the other states, it must do so subject to the same terms and conditions that apply to its provision of such services in the lower 48 states. Also, upon termination of the JSA, AT&T must continue to purchase common carrier services from Alascom in amounts declining to zero over the next two and one-half years.<sup>12</sup> Transition mechanisms for the new market structure also include payment, in two installments, by AT&T of \$150 million to Alascom to minimize intrastate cost shifts as AT&T decreases its usage of Alascom switches.<sup>13</sup>

8 The Alaska Spur: In 1991, the Chief of the Common Carrier Bureau authorized Alascom to acquire and operate a fiber optic

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<sup>10</sup> Id. at 3023-4, note 15.

<sup>11</sup> "Bush" locations are the widely dispersed, small communities that include much of Alaska's population. In the most remote of these communities, Alascom has exclusive rights to offer telephone service and faces no competition.

<sup>12</sup> Market Structure Order, 9 FCC Rcd 3025.

<sup>13</sup> See Joint Board's Final Recommendation at paras. 135-36; Market Structure Order, 9 FCC Rcd at 3025. The Commission adopted the Joint Board's recommendation that Alascom use this transition payment to reduce entirely the balance in its Central Office Switching account and then apply the remainder proportionately to all remaining plant accounts, with the exception of the Deep Sea Cable account, which supports the Alaska Spur. As a consequence, no portion of either of the two installment payments from AT&T to Alascom is to be used to reduce the Deep Sea Cable/Alaska Spur plant account.

cable system (the Alaska Spur) between Alaska and Oregon for the provision of interstate switched and private line services.<sup>14</sup> Alascom objected to conditions specified in the Alaska Spur Authorization and rejected the Authorization pending grant of its Application for Review. Alascom then requested Special Temporary Authority (STA) to operate the Alaska Spur, which the Chief of the Domestic Services Branch, Common Carrier Bureau, granted.<sup>15</sup> Subsequently, the Commission delayed action on the Application for Review, pending outcome of the Federal-State Joint Board proceeding. Until now, the Alaska Spur STA has been renewed eight times, and it is presently in effect.<sup>16</sup>

9     The Market Structure Order and the Alaska Spur: As it relates to the Alaska Spur, the Joint Board recommendation, as adopted by the Commission, requires that the terms and conditions offered by Alascom for use of the Spur be public and non-discriminatory, whether Alascom uses a tariff or files various contracts with the Commission. In its pricing, Alascom is required to comply with relevant cost-of-service principles. "Since the contracts, leases, or tariffs governing use of the Alaska Spur will be submitted for Commission review, pricing issues can be considered further at that time."<sup>17</sup>

### III. THE APPLICATION FOR TRANSFER OF CONTROL

#### A. The Information Requirements

##### i. Background

10 Section 63.01 of the Commission Rules states the basic information requirements for most applications under Section 214 of the Communications Act. All the information requested in Section 63.01 has not always been required in cases of applications to acquire telecommunications facilities.<sup>18</sup>

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<sup>14</sup> Alaska Spur Authorization.

<sup>15</sup> See letter from Abraham Leib, Chief, Domestic Services Branch, Common Carrier Bureau to Charles Naftalin, Koteen & Naftalin, attorneys for Alascom, dated August 6, 1993.

<sup>16</sup> Letter from John S. Morabito, Deputy Chief, Domestic Facilities Division, Common Carrier Bureau to Vicki Schultheis, Sr. FCC Licensing Specialist, Alascom, Inc., dated July 19, 1995.

<sup>17</sup> Joint Board's Final Recommendation, 9 FCC Rcd at 2217.

<sup>18</sup> See infra n. 24.

## **ii. Application**

11 Applicants assert that, because they only seek authority for a transfer of control of Alascom and do not seek any authority to change Alascom's facilities or operations, the detailed information requirements of Section 63.01 of the Commission's Rules are inapplicable.<sup>19</sup> Applicants do not believe that the information specified by Section 63.01 of the Commission's Rules is required for transfers where no specific construction of new facilities is being proposed.<sup>20</sup>

## **iii. Comments**

12 United argues that the Application is missing information required by Section 63.01 of the Rules. United asserts that the missing data are critical because they bear on AT&T's plans for modernizing Alascom's Bush facilities and require estimates of costs and cost-bases for such improvements. United claims that the information should be of special interest to the Commission, which has recognized the inequity of placing at risk communications in the remote areas of Alaska. United requests that AT&T be required to submit adequate plans for modernization of Alaskan Bush services and that grant of the Application be conditioned on fulfillment of those plans.<sup>21</sup>

## **iv. Discussion**

13 In general, applications filed pursuant to Section 214 of the Communications Act are required for transfers of control even if no new facilities are constructed. Section 214 states that: "No carrier shall ... acquire or undertake the operation of any line ... unless and until there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require ..." such acquisition.<sup>22</sup> Section 63.01 of our rules states: "Any party proposing to undertake ... operation of any line ... for which authority is required under Section 214 of the Communications Act ... shall request such authority by formal application. [The application]

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<sup>19</sup> Application, Appendix B, at 8.

<sup>20</sup> Applicant's Reply at 8.

<sup>21</sup> United's comments at 17.

<sup>22</sup> 47 U.S.C. § 214.



... must include the following information as applicable."<sup>23</sup> The subsequent list of information requirements is extensive. Much of it refers to matters involving construction of facilities, which is not contemplated in the present case. Mandating strict compliance with each subsection of Section 63.01 in every case would not further the public interest.<sup>24</sup> This is especially true of those applications involving acquisitions of stock.<sup>25</sup> The information requirements have been promulgated to expedite handling of routine cases. Since most Section 214 applications involve facilities construction, the rules primarily address those aspects of the application process. We have not adopted special rules for Section 214 applications for mergers and other transfers. Carriers have sometimes obtained such certification by filing applications designed to meet the general requirements of Section 214, without specific reference to any of our implementing rules.<sup>26</sup> Furthermore, even where authority is sought pursuant to Section 63.01, that Section does not require formulation of plans for speculative future construction requirements. In this case, Applicants have provided us with information pertaining to all aspects of the requirements set out in the Joint Board's Final Recommended Decision, as adopted in the Market Structure Order. The market structure specified therein represents a comprehensive outline of what the Commission has determined will best serve the public convenience and necessity for Alaska's telecommunications services. The information necessary to determine whether the proposed merger conforms to that structure is, therefore, fully sufficient for a determination as to whether the proposed acquisition provides for the public convenience and necessity, as required by Section 214 of the Communications Act. Thus, we believe we have sufficient

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<sup>23</sup> 47 C.F.R. § 63.01 (emphasis added).

<sup>24</sup> See, e.g., In the Matter of Telnet Corporation Vienna, Virginia General Telephone and Electronics Corporation Washington, D.C. Proposed Merger, 70 FCC 2d 2249, 2252 (1979). "Furthermore, we do not intend to burden GTE and Telenet with strict compliance with Section 63.01 of the Commission's rules relating to the filing requirements of Section 214 applications. The application, as we have noted above, should focus on the impact of the merger upon the public convenience and necessity as well as our obligations pursuant to Section 7 of the Clayton Act."

<sup>25</sup> See, e.g., Application of General Telephone & Electronics Corporation to Acquire Control of Telenet Corporation, 72 FCC 2d 91 (1979) n.33.

<sup>26</sup> Id.

information to consider the application on the merits.<sup>27</sup>

## **B. Conformity with the Market Structure Order's Transition and Market Structure Requirements**

### **i. Background**

14 The Market Structure Order requires, *inter alia*: (1) that the JSA be terminated; (2) that Alascom's common carrier services be offered under tariff on a nondiscriminatory basis at rates that reflect the costs of services; (3) that Alascom continue to provide private line service upon reasonable request under its existing federal tariffing and Section 214 obligations; (4) that AT&T provide northbound and southbound MTS between Alaska and the other states at integrated rates; (5) that, upon termination of the JSA, AT&T continue to purchase common carrier services from Alascom in amounts declining to zero over the next two and one-half years;<sup>28</sup> and (6) that AT&T pay \$150 million to Alascom, to be applied to reduction of Alascom's plant accounts.<sup>29</sup>

### **ii. Application**

15 Applicants assert that their proposed transfer is in conformity with these requirements of the Market Structure Order. Applicants state that they seek no material modifications of the Market Structure Order and that Alascom, under new ownership as "AT&T/Alascom," will continue to exist as a separate subsidiary of AT&T with no change in corporate, legal or regulatory status.<sup>30</sup> Applicants assert that approval will provide a certain end to the lengthy regulatory proceedings concerning the Alaska telecommunications market structure.<sup>31</sup>

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<sup>27</sup> We address United's concerns about the Bush communities below, but note here that APUC's Second Order at 5 requires AT&T/Alascom to file quality of service reports so that APUC may monitor quality of service. APUC, Id. at 6, also requires AT&T to file a Capital Plan which will include a description of its expected future transmission capabilities.

<sup>28</sup> This two and one-half year transition period will allow Alascom to slowly adjust to the absence of the "subsidies" provided under the JSA.

<sup>29</sup> Market Structure Order, 9 FCC Rcd at 3023.

<sup>30</sup> Application, Appendix B, at 8.

<sup>31</sup> Id. at 6.

### **iii. Comments**

16 Alaska Telecom asserts that the Joint Board's Final Recommendation, as adopted by the Commission, was premised upon the continuing independent, mutually competitive participation of AT&T, Alascom and GCI in the Alaska market after termination of the JSA. Alaska Telecom describes the transfer as abandonment of the Alaskan market structure, transition mechanisms and orderly transition period prescribed in the Market Structure Order.<sup>32</sup>

17 In its Comments, GCI supports the proposed transfer, subject to certain conditions to ensure competitive entry into the Alaska market and provided that the transfer is found to conform to the recommendations adopted in the Market Structure Order. GCI asks the Commission to make its determination as to whether the transaction is consistent with the adopted recommendations "based on the existence of AT&T/Alascom as a separate corporate entity from AT&T."<sup>33</sup>

18 Applicants deny that the Joint Board's Final Recommendation and the Market Structure Order were predicated on Alascom's continued participation in the interstate MTS and WATS market as a subsidiary of PTI after the JSA is terminated. Applicants state that both AT&T and AT&T/Alascom will continue to be subject to the Market Structure Order.<sup>34</sup>

### **iv. Discussion**

19 Pursuant to the Market Structure Order, upon termination of the JSA, Alascom would be allowed to offer interstate MTS/WATS independently from AT&T with no obligation to charge AT&T's integrated rates.<sup>35</sup> The Joint Board's Final Recommendation, however, as adopted in the Market Structure Order, also contemplates the possibility that Alascom will exit the market.<sup>36</sup> Alaska Telecom's assertion that the Market Structure Order was premised upon the mutually competitive participation of AT&T,

<sup>32</sup> Alaska Telecom's Petition to Deny at 2.

<sup>33</sup> GCI's Comments at 2.

<sup>34</sup> Applicant's Reply at 19-23.

<sup>35</sup> Market Structure Order, 9 FCC Rcd at 3023.

<sup>36</sup> Joint Board's Final Recommendation, 9 FCC Rcd at 2204. "Alascom must file a transition plan and file for permission under Section 214 of the Communications Act prior to exiting the MTS market if it chooses to exit that Market."

Alascom and GCI in the Alaska market after termination of the JSA is, therefore, incorrect. Furthermore, AT&T/ Alascom will continue to provide service as a separate corporation from AT&T. All essential elements of the recommended market transition mechanisms established in the Market Structure Order will be preserved in the Application and Stock Purchase Agreement. The purpose of delaying termination of the JSA was to provide Alascom sufficient time to adjust to the new market structure. The proposed acquisition represents just such an adjustment. In all these respects, the proposed transfer of ownership is in accord with the Market Structure Order.

20 Of course, as Applicants have noted, compliance of the Stock Purchase Agreement with the Market Structure Order's provisions establishing distinct rate structures for AT&T and Alascom requires that we grant the requested AT&T/Alascom waiver of Section 61.41(c), the "all or nothing rule." This will allow AT&T/Alascom to file rate-of-return based rates for interstate switching and transport services offered to interexchange carriers while AT&T continues to be subject to price cap regulation. Similarly, compatibility with the Market Structure Order's requirement that AT&T file a Section 214 application to serve Alaska by March 1, 1995, necessitates a finding that the present application constitutes such a filing. The alternative, requiring AT&T to separately file an application and serve Alaska in competition with its own subsidiary, is neither practical nor necessary to achieve reasonable compliance. The present application was filed on December 15, 1994, well before the March deadline, and serves the purposes of the filing requirement: entry of AT&T into the Alaska market. We note that no party of record has opposed the waiver request or questioned whether the application satisfies the Market Structure Order's requirements. Since we have found that consummation of the Stock Purchase Agreement will further the purposes of the Market Structure Order and will otherwise be compatible with the required market structure, we grant AT&T/Alascom a waiver of Section 61.41 of our Rules and find that the present Application fulfills AT&T's filing obligation.

### **C. Universal Service, Rate Integration and Revenue Requirement Neutrality**

#### **i. Background**

21 The Market Structure Order identified 5 basic objectives to govern the Alaska telecommunications market structure. Among these objectives were universal service, rate integration and revenue requirement neutrality.<sup>37</sup>

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<sup>37</sup> See para. 7, n.13.

## **ii. Application**

22 Applicant's assert that the proposed acquisition will assure continuation of universal service, as required by the Market Structure Order, because AT&T/Alascom will continue to be subject to Alascom's interstate obligation to serve the Bush communities, including the obligation to provide intrastate service, satellite service and non-discriminatory interstate carrier transport to these service areas. Applicants also state that the transfer will preserve rate integration for MTS and WATS to and from Alaska, as required by the Market Structure Order. They state that AT&T/Alascom is the means through which AT&T will perform its obligations under the Market Structure Order to provide MTS and WATS to and from Alaska. Therefore, even after the JSA is terminated, AT&T/Alascom will continue to file interstate tariffs with MTS and WATS rates that mirror the rates in AT&T's tariffs covering the contiguous 48 states.<sup>38</sup>

23 Applicants state that approval of the transfer will also assure that revenue requirement neutrality, mandated by the Market Structure Order, is maintained. They assert that AT&T/Alascom will have an intrastate revenue requirement that is virtually unchanged because: (1) AT&T/Alascom will continue Alascom's corporate existence and have an interstate revenue requirement that is virtually the same as Alascom's; (2) AT&T/Alascom's interstate books will reflect AT&T's \$150 million payment as required by the Market Structure Order; (3) the acquisition will provide AT&T with incentives to assure that its subsidiary provides high quality services that will be competitively attractive to purchasers, easing the concerns that led the Commission to require that AT&T purchase services from Alascom; and (4) the Alaska network will be managed by the most experienced interexchange carrier in the country.<sup>39</sup>

## **iii. Comments**

24 In its Petition to Deny, United asserts that it is an Alaskan local exchange carrier providing telephone service to 59 villages in the Alaskan Bush in a service area covering 70,000 square miles. According to United, the villages are accessible only by air. United claims that the average population of the communities it serves is approximately 250 persons and that most of the communities' inhabitants have incomes below the poverty line. According to United it jointly operates satellite earth

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<sup>38</sup> Application at 6-7.

<sup>39</sup> Id. at 8.

stations with Alascom in 46 of the 59 villages.<sup>40</sup>

25 United argues that most of the toll interconnection facilities serving the Bush are in need of upgrade. United claims that earth stations often need repair and that cannibalized parts of earth stations operated elsewhere are required to repair or expand them. United asserts that calls to nearby locations often need circuitous routing, including double hops through satellites, and that this results in transmission delays that are incompatible with standard commercial services, such as FAX, or modern digital services that could make much-needed distance learning and medical imaging services available in the Bush.<sup>41</sup>

26 United asserts that, in February of 1989, Alascom informed the Joint Board that by 1991 it would begin to upgrade its Bush earth stations to allow full digital services. United claims that the major upgrade was again promised in 1990 and 1993, but no major upgrade was performed.<sup>42</sup>

27 United argues that, throughout the Joint Board proceedings, AT&T had expressed an interest in avoiding the expenses associated with serving the Bush at less than cost-based rates. United claims that cost-based rates for such service would average \$1,000 per ratepayer per year. United argues that payment to Alascom required by the Commission to offset the costs of Alascom's past investments will not provide cost recovery for modernization.<sup>43</sup> United notes that the Commission will continue to require that 86% of the cost of Alascom's and United's circuit equipment be assigned to the interstate jurisdiction to be absorbed by AT&T's interstate ratepayers, giving AT&T an incentive to avoid investments for improvement in those facilities.

28 In their Reply and Opposition to Petitions to Deny, Applicants disagree with United's assessment of the state of communications in the Alaskan Bush. Applicants state that they are aware of the vital importance of communications to residents of rural Alaska. Applicant's note that no Alaskan consumer or business customer has offered comments in opposition to the transfer. Applicants state that AT&T's various proposals for more equitable spreading of Alaska service costs did not

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<sup>40</sup> United's Petition to Deny at 1-3.

<sup>41</sup> Id. at 4-7.

<sup>42</sup> Id. at 8-10.

<sup>43</sup> Id. at 13.

represent an objection to efficient upgrade of services to the Alaska Bush. Rather, AT&T was objecting to the inefficient incentives arising from the JSA's requirement that it pay for investments determined solely by Alascom. Applicants state that this inefficiency will be eliminated by termination of the JSA. Applicants note that the Joint Board agreed that elimination of such an incentive for inefficiency would be a positive benefit to Alaskan telecommunications.<sup>44</sup> Applicants assert that only 12% of Alascom's traffic, and none of its interstate traffic, is affected by the "double hop" of which United complains. Applicants state that Alascom's facilities can already provide some sophisticated distance learning services for the Bush and that Alascom has demonstrated a capacity to provide telemedicine in rural areas. Applicants state that Alascom's maintenance record in the Bush has been very good; from 1992 to 1994, rural service was operational over 97.5% of the time, despite very severe weather conditions.<sup>45</sup> Applicants state that a task force has already been assigned to estimate AT&T/Alascom's capital needs with a view to providing high quality services. When the task force has completed its recommendations, Applicants state they will be made available. Applicants assert that service will continue to be affordable for Bush residents, since AT&T/Alascom will continue to file interstate tariffs with MTS/WATS rates that mirror the rates in the lower 48 states and 86% of the cost of Alascom's circuit equipment will continue to be assigned to the interstate jurisdiction.<sup>46</sup>

29 In its Reply, Alaska Telecom states that the Alaska Spur is unreliable, having been out of service a total of 140 days or 10% of its operational life, and that Alaska Telecom, as a facilities based provider, would be able to compensate for this deficiency with its proposed higher quality, greater capacity undersea cable.<sup>47</sup>

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<sup>44</sup> Applicant's Reply at 5, citing Joint Board's Final Recommendation, 9 FCC Rcd at 2201 and 2216. See also Market Structure Order, 9 FCC Rcd at 2202 (the Commission reasoned that both GCI and AT&T had offered to serve the Bush communities following termination of AT&T's reimbursements under the JSA.)

<sup>45</sup> Id. at 7.

<sup>46</sup> Applicant's Reply 4-10.

<sup>47</sup> Alaska Telecom's Reply at 17-21. We note that unreliable service in the Bush areas resulting, in part, from the alleged unreliability of the Alaska Spur, may pose a threat to universal service.

30 In its Reply, United asserts that there have been significant consumer complaints about Alascom's service to the Bush areas. United says that complaints were sent to Alascom by the Distance Delivery Consortium. United asserts that its own stockholders are Alaskan Bush telecommunications consumers and that United's own assessment of service deficiencies in the Bush constitutes a consumer complaint. United claims that, in the 46 communities in which United and Alascom jointly own earth stations, 40% of the customers' calls are subject to "double hops" through satellite transponders. United asserts that, during a recent failure of the Alaska Spur, all interstate calls to and from rural Alaskan communities were subject to "double hops" as a result of being rerouted through satellite transponders and that two other services, including an educational channel, carried by satellite and primarily used by rural Alaskans were entirely preempted. United disputes the significance of Applicant's example of Alascom's ability to provide distance learning to rural Alaska using its present facilities. United claims that the example involved a unique service for a single school district, the richest in Alaska.<sup>48</sup> United asserts that the only rural telemedicine services offered by Alascom are also unique non-satellite, private line services not at all typical of telecommunications in the Bush. United cites figures showing that 99.93% reliability (an average of about 1 minute a day of service unavailability) is generally accepted as a service reliability standard by the industry.<sup>49</sup> United says that Applicant's acknowledged service record of 97.5% (about 36 minutes a day when service is unavailable) is unacceptable.<sup>50</sup> United says its request that Applicants provide specific plans for modernizing telecommunications services to the Alaskan Bush is not adequately answered by Applicant's claim that they are studying the matter. United cites Alascom's alleged record of failed promises and the current planned or actual deployment of advanced services in the United states and in Canadian rural communities as evidence that

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<sup>48</sup> United's Reply at 4-7; United points out that the school district in question included within its territory the North Slope oil field.

<sup>49</sup>See Network Reliability: A Report to the Nation, ed. International Engineering Consortium, June 1993, Section I, p.11.

<sup>50</sup> United's Reply at 8-9, citing BOC Notes on the LEC Network, Bellcore Special Report SR-TSV-002275 (1994) at 4-45; see also Network Reliability: A Report to the Nation., ed. National Engineering Consortium, (1993) Section I at 11, where local exchange carrier switches as a whole showed a reliability level of 99.999%.



modernization is overdue.<sup>51</sup>

#### **iv. Discussion**

31 AT&T/Alascom will continue Alascom's corporate identity as a separate subsidiary of AT&T.<sup>52</sup> Hence, the new entity must comply with all the requirements imposed upon Alascom and AT&T by the Market Structure Order. These requirements were designed to maintain the intrastate revenue requirement, rate integration and universal service. It makes little difference that Alascom will be under new ownership for these purposes. We agree, therefore, that AT&T/Alascom will have an intrastate revenue requirement that is virtually unchanged and that the proposed transfer will not jeopardize the universal service and rate integration objectives of the Market Structure Order. Nevertheless, United's assertion that AT&T's incentives threaten needed improvements to Bush locations is of serious concern. Exceptional inequities in reliability in discrete geographical areas may undermine universal service. We find that 97.5% network up-time is acceptable for the present given the geographic areas that Alascom serves, but it must begin to improve. We note, however, the record is Alascom's, not AT&T/Alascom's. We believe that AT&T's overall reliability will extend to its new service area and that we may, therefore, reasonably expect improved efficiency with AT&T/Alascom, as discussed in more detail below. Furthermore, the Alaska Spur will soon be subject to competition from Alaska Telecom, providing further redundancy and restoration potential for cable and satellite interstate communications reliability, as well as an incentive to improve service.

32 United's assertion that AT&T will have an incentive to avoid making network improvements would apply equally to any carrier not receiving compensation for its services on a guaranteed cost-plus basis. Alascom, under the JSA, operated on such a basis. United's objection, therefore, might appear to apply more logically to termination of the JSA, which is a matter that has already been decided. We note, however, given Alascom's alleged past failure to invest in promised improvements, the spending incentives provided by the JSA were of little help to Bush customers. AT&T's objections to the inefficiency of the JSA reflect the same concerns that prompted the Joint Board to recommend termination of the JSA. AT&T does not object to investment in Bush facilities as such.<sup>53</sup> Thus we find that

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<sup>51</sup> United's Reply at 11-12.

<sup>52</sup> Application, Appendix B, at 8.

<sup>53</sup> Applicant's Reply at 4-5.

United's concern that AT&T will be predisposed not to make necessary improvements in Bush services is unwarranted. We note, however, that under the Communications Act we are empowered to require carriers under our jurisdiction to provide telecommunications services where necessary.<sup>54</sup>

33 We find that improvements in service to the Bush areas are likely with AT&T management of Alascom. We find, therefore, that universal service, rate integration, and revenue requirement neutrality will be preserved with authorization of the proposed merger.

#### **D. Effects on Competition and Efficiency**

##### **i. Background**

34 The Market Structure Order also identified promoting market based competitive entry and encouraging increased efficiency,<sup>55</sup> as basic objectives for the Alaska market. Analysis of these criteria are essential to our determination that the proposed transfer serves the public convenience and necessity.

##### **ii. Application**

35 Applicants assert that they made the filing required under Hart-Scott-Rodino, 15 U.S.C. §18(a) on November 15, 1995, and that no objection has been interposed by the Department of Justice or the Federal Trade Commission to the proposed transfer. Applicants further assert that competition will be facilitated by the entrance of AT&T into the Alaska marketplace even before the JSA is terminated because AT&T/Alascom will be obliged to offer its services to all carriers on a non-discriminatory basis and on terms comparable to those offered to its affiliates. Applicants state that GCI, the other major facilities-based carrier in Alaska, already has a 40% share of interstate MTS/WATS market and a significant share in the other services offered by Alascom. Applicants allege that Alascom's historical need for subsidies make it highly unlikely that it could survive independently as a competitor after termination of the JSA, when AT&T Communications would be offering service to Alaskans at nationwide averaged rates.<sup>56</sup>

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<sup>54</sup> See, e.g., 47 U.S.C. §§151, 201, 214(d); Market Structure Order, 9 FCC Rcd at 3029.

<sup>55</sup> See Market Structure Order, 9 FCC Rcd at 2198.

<sup>56</sup> Application at 10.

36 Applicants further claim that the acquisition will promote economic efficiency: "if AT&T owns Alascom and also has an obligation to serve Alaska MTS and WATS customers with integrated rates, it will have the most powerful of economic incentives to provide Alaska services efficiently."<sup>57</sup>

### **iii. Comments**

37 In its Petition to Deny, Alaska Telecom states that it is an applicant before the Commission for a license to land<sup>58</sup> and operate a digital submarine fiber optic cable extending between the Pacific Northwest United States and the State of Alaska.<sup>59</sup> Alaska Telecom claims that AT&T's proposed sudden acquisition within Alaska of submarine cable and satellite services, which will originate interstate telecommunications services would prevent other facilities-based competitors from entering the Alaskan telecommunications market. Alaska Telecom asserts that AT&T would become the dominant carrier in Alaska and would be able to dictate the terms of access to needed facilities. Alaska Telecom claims that AT&T's ownership of Alascom will allow AT&T to subsidize Alascom just as it did under the JSA. Alaska Telecom claims that PTI's covenant not to compete for the three years following the closing date of the Stock Purchase Agreement (SPA) is fundamentally anticompetitive because it prevents PTI from entering the Alaskan market as a competitor.<sup>60</sup>

38 Alaska Telecom raises certain specific issues regarding the Alaska Spur and states that these issues should be clarified before the Application for transfer is considered. Alaska Telecom asks the Commission to "precisely define the conduct" of the owners of the Spur and its related facilities as to access, required use of compression equipment, their affiliations, and their contractual relationships.<sup>61</sup>

39 In its Comments, GCI raises concerns that anticompetitive effects might follow the proposed acquisition, depending on how

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<sup>57</sup> Id. at 11.

<sup>58</sup> "Land" is a term of art meaning to terminate an undersea cable within United States territory.

<sup>59</sup> Alaska Telecom's Petition to Deny at 2. See Application of Alaska Telecom, Ltd., L.C., FCC File No. S-C-L-94-004 (1994).

<sup>60</sup> Alaska Telecom's Petition to Deny at 9-14.

<sup>61</sup> Id. at 14-16.

the Applicants specifically respond to certain questions not addressed in the Application. GCI requests that Applicants specify: 1) whether AT&T/Alascom will withdraw the Application for Review of the Alaska Spur Authorization, and whether it will sell additional capacity in the Spur to other carriers; 2) whether AT&T and AT&T/Alascom will have separate tariffs and at what terms; 3) whether AT&T will purchase interconnection and other services from AT&T/Alascom on the same basis that services are made available to other carriers, where the points of interconnection will be and whether interconnection will be offered to all carriers on the same basis; 4) whether AT&T/Alascom will continue Alascom's role as numbering plan administrator and, if so, how numbering will be administered; and 5) whether PTI could have an affiliate provide access through an access tandem in Alaska or provide fiber optic cables for interstate or international services, despite the covenant not to compete.<sup>62</sup>

40 In their Reply, Applicants deny that AT&T will be in a position to dictate the terms and conditions of facilities access in Alaska. Applicants claim that nothing prevents Alaska Telecom from building its submarine fiber-optic cable in competition with the Spur and that any construction of facilities in Alaska by AT&T or AT&T/Alascom will be subject to review by the Commission and the APUC. Applicants' responses to GCI's other requests for information are as follows: 1) AT&T/Alascom has not determined whether it will withdraw Alascom's Application for Review of the Alaska Spur authorization; 2) AT&T does not intend separately to provide rate integrated services from Alaska;<sup>63</sup> 3) AT&T/Alascom and AT&T will provide services to each other and to other IXC's at

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<sup>62</sup> GCI's Comments at 3-5. Additionally, GCI requests copies of any agreements or exhibits that relate to the transaction. Applicants state that information contained in the agreements and exhibits requested by GCI is proprietary and does not relate to telecommunications services.

<sup>63</sup> AT&T states that it would be pointless for AT&T and AT&T/Alascom to "compete" for services covered by the rate integration requirement. Nor does AT&T presently intend to provide other services from Alaska. Instead, AT&T/Alascom will continue to file separate interstate tariffs at rates for MTS and WATS that mirror AT&T's rates for comparable services in the lower 48 states. AT&T/Alascom will amend Alascom's cost allocation plan (CAP) within 60 days of Commission approval of the Application. Where it would make sense, however, AT&T reserves the right to provide Alaskan services directly in the future, particularly where services may be provided to business customers. Applicant's Reply at 12.

the present interconnection points on a non-discriminatory basis;

4) AT&T/Alascom expects to continue as the numbering plan administrator for Alaska; 5) the two switches in Fairbanks and Juneau that PTI continues to own will be used in the lower 48 states; and 6) the scope of the covenant not to compete is subject to the standard legal interpretation given such covenants. Applicants reject GCI's request for copies of related contracts and agreements other than the Stock Purchase Agreement provided with the Application.<sup>64</sup>

41 In its Reply, Alaska Telecom claims that authorization of the transaction will result in immediate AT&T control of at least 60% of the originating Alaskan intra- and interstate telecommunications minutes. Alaska Telecom states that AT&T has controlling interests in virtually all existing interstate facilities, including the undersea cable, the Aurora satellite transponders and earth stations, and 3,300 miles of microwave radio links. Alaska Telecom asserts that eventually AT&T's control of facilities and minutes will be so extensive that it would not be economically feasible for a prospective competitor to introduce facilities-based competition into Alaska without prior commitment by AT&T or AT&T/Alascom to use the proposed facilities. Alaska Telecom speculates that PTI will permanently exit the Alaskan interexchange market and that GCI, the only other facilities-based MTS provider in Alaska, will be unable to compete against AT&T/Alascom's provision of interstate MTS and WATS at integrated rates. Alaska Telecom states that AT&T/Alascom will use the \$150 million it is to receive under the Market Structure Order to write down net intrastate plant and equipment. As a result, Alaska Telecom believes GCI will be able to purchase AT&T/Alascom's intrastate interexchange business at a reasonable price. Thereafter, Alaska Telecom claims, GCI will become the exclusive provider of Alaskan intrastate interexchange services and AT&T will be the exclusive provider of interstate services for Alaska.<sup>65</sup>

42 Finally, Alaska Telecom asks the Commission, before approving the transaction, to determine: (1) who controls the Alaska Spur in light of Alascom's rejection of Section 214 authority, as presently conditioned, to acquire and operate the Spur; (2) who controls the facilities through which access to the Spur must be obtained; and (3) what effect PTI's covenant not to compete will have on those access facilities.<sup>66</sup>

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<sup>64</sup> Applicant's Reply at 11-13.

<sup>65</sup> Alaska Telecom's Reply at 5-7.

<sup>66</sup> Id. at 23.

43 In its Reply, GCI supports the proposed transfers if authorization is granted subject to a number of conditions. GCI asks that the Commission: (1) require AT&T to file separate Section 214 Applications for any entry into the Alaskan market other than through AT&T/Alascom; (2) maintain all conditions for Section 214 authorization of the Alaska Spur; (3) require that all services, features, functions and facilities made available by AT&T/Alascom to AT&T or by AT&T to AT&T/Alascom be made available to all carriers on a non-discriminatory basis; (4) impose affiliate transaction reporting requirements on all exchanges of value between AT&T/Alascom and AT&T or between AT&T/Alascom and any AT&T affiliate; (5) require AT&T/Alascom to make access to other carriers available at any technically feasible point; (6) require AT&T/Alascom to continue offering Alaskans originating access for 800 services; (7) require that AT&T/Alascom continue to provide service under rate-of-return regulation at the rate-of-return specified in the Market Structure Order;<sup>67</sup> (8) require AT&T to make telephone numbers available to all carriers on a non-discriminatory basis; and (9) prohibit PTI from using, for service within Alaska, the switches retained under the Stock Purchase Agreement.<sup>68</sup>

#### **iv. Discussion**

44 Summary. On balance, we find that the proposed merger between AT&T and Alascom will have no anti-competitive effects or negative consequences for consumers. As a result of the merger, we foresee gains in efficiency, improved entry into the Alaska interstate telecommunications market for competitors, and a greater possibility that with acquisition by AT&T, there will be continued, effective use of Alascom's assets for telecommunications in Alaska. As the following discussion explains, we find two relevant product markets: interexchange service within Alaska and interstate interexchange service between Alaska and other points. We find that the proposed merger will not have anticompetitive effects in either market, but may, in fact, have some pro-competitive benefits in the market for interexchange service within Alaska.

45 Our analysis of the effects of the proposed merger on competition within Alaska necessarily takes account of the fact that marketplace forces have been limited in their operation in Alaska due to several factors. For instance, the unique geography, topography, and population distribution of the State

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<sup>67</sup> Market Structure Order, 9 FCC Rcd at 3027.

<sup>68</sup> Applicant's Reply at 4-9.

of Alaska have limited the economic incentives for carriers to serve large parts of the state. It is our intention, therefore, while recognizing current conditions in Alaska, to start moving towards telecommunications markets in Alaska in which marketplace factors are able to operate more freely than before.

46 Legal Standards. Our examination of a transfer of control under the public interest standard of Titles II and III of the Act<sup>69</sup> includes consideration of the effect of the transfer on competition in the future. In addition, Sections 7 and 11 of the Clayton Act empower this Commission to disapprove anti-competitive acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy."<sup>70</sup> Accordingly, it is necessary to consider the antitrust consequences of this proposed combination and weigh those consequences with other public interest factors."<sup>71</sup>

47 In a number of recent decisions regarding various mergers and acquisitions, the Commission has applied antitrust guidelines and analysis to identify relevant product and geographic markets for the purpose of evaluating the competitive effects of those actions.<sup>72</sup> We will follow that same analytical framework here. In addition to such analysis, this decision addresses the potential effect of this transfer, which is effectively a proposed merger, to lessen competition in the relevant markets, or to increase the risk of other abuses of market power.

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<sup>69</sup> 47 U.S.C. §§214 and 309-10.

<sup>70</sup> Both AT&T and Alascom are interstate common carriers. Section 11 of the Clayton Act, quoted in the text above, may be found at 15 U.S.C. § 21(a). We have discretion whether to enforce Section 7 of the Clayton Act. United States v. FCC, 652 F.2d 72, 83 (D.C. Cir. 1980) (en banc). Because we find our jurisdiction under the Act to be sufficient to address all the competitive effects of the proposed transfer, we exercise our discretion not to invoke our Clayton Act jurisdiction in this proceeding.

<sup>71</sup> United States v. FCC, 652 F.2d at 72; OTI Corp., Order, 6 FCC Rcd 1611, 1612 (1991).

<sup>72</sup> See, e.g., Application of Craig O. McCaw, Memorandum Opinion & Order, 9 FCC Rcd 5836, 5844-45 (1994), aff'd sub nom. SBC Communications, Inc. v. FCC, No. 94-1637 (D.C. Cir., June 23, 1995), petition for reconsideration pending on other grounds.

48 Relevant Markets. We find one relevant product market for purposes of evaluating this proposed merger to be interexchange telecommunications services within Alaska ("the Alaska Market"), which is the principal business of the acquired company, Alascom.

We find another relevant market to be interstate interexchange telecommunications ("the All Interexchange Market"), which is a business of the acquiring party, AT&T, and includes Alascom's and Alaska Telecom's proposed undersea fiber cable services. This latter determination is consistent with the Commission's earlier findings of a single market for all interstate interexchange services.<sup>73</sup> No party has proposed other relevant markets, and these findings are generally consistent with the parties' submissions herein.

49 The competitors in the Alaska Market are Alascom and GCI.<sup>74</sup> Alaska Telecom points out that Alascom has approximately 60% of this Market and GCI has approximately 40%.<sup>75</sup> The competitors in the All Interexchange Market are AT&T, MCI, Sprint, LDDS, and numerous other facilities-based carriers and resellers. We have found that in the All Interexchange Market there is supply substitution.<sup>76</sup>

50 Competitive Analysis. The parties to the proposed merger do not compete with each other. Accordingly, the proposed merger will not eliminate a competitor in any relevant market. Both before and after the proposed merger, there will be the same number of competitors in each relevant market.<sup>77</sup> Nor does it

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<sup>73</sup> See, e.g., Common Carrier Services, 95 FCC 2d 554, 562-63 (1983), rev'd on other grounds sub nom., AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992); see also In re Application of Craig O. McCaw and AT&T for Consent to Transfer Control of McCaw Cellular, 9 FCC Rcd 5836, 5845 (1994) recon. pending (McCaw), aff'd, SBC Communications, Inc., et al. v. FCC, No. 94-1637, 1995 WL 370405 (D.C. Cir. June 23, 1995).

<sup>74</sup> In general, Alascom serves the entire Alaska Market, both the large cities and "the Bush," while GCI concentrates on only the large cities. See Joint Board's Final Recommendation, 9 FCC Rcd at 2206.

<sup>75</sup> The 40% market share figure is apparently based on the percentage of customers. Alaska Telecom's Reply at 9-12, citing figures from GCI's: 1993 Annual Report, December 31, 1993 Form 10-K, and September 30, 1994 Form 10-Q filings with the Securities and Exchange Commission.

<sup>76</sup> McCaw, 9 FCC Rcd at 5847.

<sup>77</sup> See, e.g., United States Citizens v. Southern National Bank,



appear likely that the post-merger entity (AT&T-Alascom) will be a weaker competitor in either market. On the contrary, the affiliation of AT&T with Alascom will likely be a strengthened competitor in the Alaska Market.<sup>78</sup>

51 Two types of objections have been raised to the proposed merger. One concerns the doctrine of potential competition and involves both relevant markets. The other, which is the principal issue addressed by Alaska Telecom and GCI, involves AT&T's alleged market power in the All Interexchange Market and its possible extension into the Alaska Market by means of control of Alascom.

52 Potential Competition. The doctrine of potential competition, or the "waiting-in-the-wings effect," may be invoked when two entities that are in related markets propose to merge (or otherwise affiliate).<sup>79</sup> In essence, in analyzing the competitive effects of such a proposed merger, the potential competition doctrine weighs the possibility that each party would enter the other's market, not by affiliating, but by itself "de novo." In that event, there would be more competition than if the merger occurred, and the merger may be considered to have anti-competitive effects. Alaska Telecom makes a similar argument here.<sup>80</sup> We find the arguments raised in the record regarding the effects on "potential competition" inapplicable because there has been no showing that, without the proposed transfer, either AT&T or Alascom would enter the other's market (or has been expected to do so).<sup>81</sup>

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422 U.S. 86 (1975); Ball Memorial Hospital v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986).

<sup>78</sup> United States v. FCC, 652 F.2d at 96-97.

<sup>79</sup> The doctrine of potential competition was summarized in the dissenting opinion in Alberta Gas Chemicals, Ltd. v. E.I. duPont de Nemours & Co., 826 F.2d 1235, 1253-55 (3rd Cir. 1987)

<sup>80</sup> Alaska Telecom's Reply at 5-7.

<sup>81</sup> See, e.g., Alberta Gas Chemicals, Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235, 1253-54 (3rd Cir. 1987) (dissenting opinion) (internal citations omitted), summarizing United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-37 (1973); United States v. Marine Bancorp., 418 U.S. 602, 625 (1974); Alberta Gas Chemicals, 826 F.2d at 1254-55 (dissenting opinion) (internal citations omitted), summarizing United States v. Marine Bancorp., 418 U.S. at 630; Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982).

53 Possible Abuse of Market Power. Alaska Telecom states that AT&T is still classified by the Commission as a "dominant carrier" as to certain services in the All Interexchange Market, and argues that AT&T/Alascom will use that power to Alascom's unfair advantage in the Alaska Market. We find these claims unmeritorious. As AT&T notes, all offerings of service between AT&T in the Interstate Market and Alascom in the Alaska Market will be made pursuant to tariffs filed with this Commission. Thus, as GCI has requested, carriers in the Alaska Market will have available from AT&T, on a non-discriminatory basis, all services that AT&T offers Alascom. There will be non-discriminatory access. We will not require AT&T/Alascom to make access to other carriers available at any technically feasible point. There has been no showing of need for such a sweeping obligation. AT&T/Alascom will continue to provide service as a separate corporation from AT&T. Any future change in that status will require Commission review and approval under Section 214. AT&T and AT&T/Alascom will be subject to our affiliate transaction rules. Also, as a carrier subject to our Joint Cost rules, AT&T must adhere to Section 32.27, which sets forth the terms under which carriers may record affiliate transactions in their accounting records. In addition, the Joint Cost rules also require that AT&T and other subject carriers file Cost Allocation Manuals (CAMs)<sup>82</sup> which set forth the procedures carriers use to comply with the Commission's affiliate transaction rules and other cost allocation standards.

54 Therefore, we require AT&T and AT&T/Alascom to subject all transactions between themselves to these rules as a condition of our approval of the transfer. In addition, under our rules, AT&T is required to keep current its CAM on file with this Commission. In order to facilitate prompt review of CAM compliance and safeguard against improper cross-subsidies between service offerings, we hereby require that AT&T file any necessary CAM amendments promptly upon the consummation of the proposed transaction.<sup>83</sup> By application of these established regulatory safeguards to AT&T/Alascom, we will have substantial assurance

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<sup>82</sup> See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 6283 (1987).

<sup>83</sup> We waive the requirement that certain CAM changes be submitted 60 days before such changes are implemented. See AT&T's permanent Cost Allocation Manual, 3 FCC Rcd 1786, 1798 (1988). We also note here that the State of Alaska may require AT&T/Alascom accounting records for their regulatory oversight, to the extent that it has jurisdiction over AT&T/Alascom activities.

that AT&T's offerings to all carriers in the Alaska Market are both reasonable in absolute terms and not unreasonably discriminatory in Alascom's favor.<sup>84</sup>

55 We find that these requirements should suffice to prevent anti-competitive self-dealing. We need not further require AT&T to file separate Section 214 applications for every future independent project in Alaska, as requested by GCI. Section 63.06 of the Commission's Rules states that "any carrier may submit to the Commission a procedure pursuant to which such carrier proposes to request authority covering an annual program of projects for the supplementing of its existing facilities ... in lieu of filing separate applications." Where Section 63.06 is not applicable and authority under Section 214 of the Act is required, AT&T must apply for such authority separately. Where Section 63.06 of our rules is applicable, AT&T may keep the Commission apprised of projects within Alaska under an approved annual program plan. We do not wish to unnecessarily burden any carrier who wishes to compete in Alaska. Therefore, we also reject GCI's request that we prohibit PTI from using, for service within Alaska, the switches retained under the Stock Purchase Agreement. After the term specified in its covenant not to compete, PTI should be free to use its resources to reenter the Alaska interstate market.<sup>85</sup> We deny GCI's other requests because these concerns have already been addressed in the Market Structure Order. AT&T/Alascom will be subject to the rate requirements contained in the Market Structure Order. AT&T must also comply with the Communications Act and make telephone numbers, including office codes, available to all carriers on a non-discriminatory basis.<sup>86</sup> In addition, AT&T/Alascom will be

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<sup>84</sup> See, e.g., In re Texas Broadcasting Corporation, 42 FCC 2d 997 (1973); Xerox-Western Union International, 74 FCC 2d 471 (1979), In re General Telephone and Electronics Corporation and Telnet Corporation, 72 FCC 2d 111 (1979) request for comments, 85 FCC 2d 409 (1981), order on monitoring compliance, 91 FCC 2d 215 (1982); In re GTE Corporation and Southern Pacific Company, 94 FCC 2d 235 (1983).

<sup>85</sup> We note that APUC's Second Order, U-95-26 Order No. 2 at 10, requires PTI to file information on the final disposition of the switches at issue because deployment of those switches "has the potential to effect both costs and services." We have no objection to APUC's determinations as to the use of the switches for intrastate service.

<sup>86</sup> See In the Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois, Declaratory Ruling and Order, 10 FCC Rcd 4596, 4607 (1995); see also In the Matter of Administration of the North American Numbering Plan,

subject to our Section 214 filing requirements for discontinuances and will continue offering Alaskans originating access for 800 services unless the Commission first approves discontinuance.<sup>87</sup>

56 To the extent that Alaska Telecom complains about a company of AT&T's size entering the Alaska Market, and fears that it cannot compete against AT&T,<sup>88</sup> we respond that the Commission's statutory responsibility is to protect competition, not competitors.<sup>89</sup> As we have said before,

[t]he issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market.... Such advantages do not ... mean that these markets are not competitive ... [or] that it is appropriate for government regulators to deny [AT&T] the efficiencies its size confers in order to make it easier for others to compete.<sup>90</sup>

57 In light of the tariff and affiliate transaction protections we have imposed above, we find that AT&T's dominant status in the All Interexchange Market will not be aggravated by the proposed merger and that it will not impair competition in the Alaska Market. Finally, just as Alascom has arranged to merge with AT&T and obtain competitive strength from that association, its competitor GCI is equally capable of affiliating with another substantial company from the "Lower Forty-Eight." In fact, GCI

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FCC 95-283, CC Docket No. 92-273, adopted July 13, 1995.

<sup>87</sup> GCI's request that we confirm the retention of the conditions for Section 214 authorization of the Alaska Spur to which Alascom objected in its Application for Review is treated at length in Section IV infra.

<sup>88</sup> Alaska Telecom's Reply at 5-6.

<sup>89</sup> Hawaiian Telephone Co. v. FCC, 498 F. 2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of "competition not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors").

<sup>90</sup> Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5891-92 (1991).

is already partly owned by MCI.<sup>91</sup>

58 Facilitating Entry. The Market Structure Order found that the JSA, by giving Alascom an artificial cost advantage, made it difficult for carriers other than Alascom to compete effectively in Alaska.<sup>92</sup> The Market Structure Order recognized that removal of such an artificial influence in the Alaska Market would make that Market more attractive to competitors. At the same time, the Market Structure Order was concerned that abrupt termination of the JSA could cause undue harm to Alascom. Consummation of the proposed merger will help rather than harm Alascom's continued economic viability. Because AT&T/Alascom may not discriminatorily inhibit interstate access to any Alaska location, the merger will not jeopardize the prospects for market entry.

59 Alaska Telecom's own entry into the Alaska telecommunications market by means of its proposed cable facility is in no way opposed by AT&T or hampered by AT&T's acquisition of Alascom. Indeed, Alaska Telecom urges us to facilitate its cable landing permit even as it argues that approval of the acquisition will prohibit entry by dividing the Alaska interexchange market into two separate monopolies held by AT&T/Alascom and GCI. On May 31, 1995, the Chief of the International Bureau granted Alaska Telecom's cable landing permit.<sup>93</sup> In its landing permit application and comments, Alaska Telecom claimed that the cable would provide significant public interest benefits in the form of encouraging competitive entry and increased efficiency, additional capacity, redundant capacity, and restoration potential.<sup>94</sup> It described the cable as a realistic alternative to Alascom's service.<sup>95</sup>

60 We note that Alaska Telecom did not amend its landing license application to reflect any change in these assertions as a result

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<sup>91</sup> Letter to William Kennard, Esq., Commission General Counsel, from James L. Lewis, MCI Vice President Regulatory Affairs, dated Nov. 4, 1994, describing "MCI's minority interest in GCI Communications Corp." and MCI's "representation on GCI's board."

<sup>92</sup> Market Structure Order, 9 FCC Rcd at 2199, para. 12.

<sup>93</sup> Alaska Telecom Ltd., L.C. Application for a License to Land and Operate a Submarine Fiber Optic Cable between the Pacific Northwest United States and the State of Alaska U.S.A., DA 95-1189, File No. SCL-94-004 (Released June 6, 1995).

<sup>94</sup> Id. at para 9.

<sup>95</sup> Id.

of the Stock Purchase Agreement.<sup>96</sup> The landing license application was unopposed by any of Alaska Telecom's potential competitors, indicating absence of an attempt to restrict market entry. We find that Alaska Telecom's projection of a closed market for Alaska telecommunications is without merit. We find that Alaska Telecom's concern that the Alaska Spur will continue to function as a "bottleneck" with anticompetitive results is unwarranted. An attempt to restrict access to the Spur is less likely to be successful, both because capacity on the Spur is presently owned by Alascom's competitor, GCI, and because potential competition from Alaska Telecom itself will discourage such efforts. Other questions involving the Alaska Spur are dealt with below.<sup>97</sup>

61 Efficiencies. The proposed transfer also meets, and even exceeds, the efficiency objectives of the Joint Board's Final Recommendation and the Market Structure Order by placing responsibility for costs and expenditures at an earlier date in the hands of the same party, thereby providing the strongest possible incentive for efficiency.<sup>98</sup> The present situation is inefficient because AT&T has to pay Alascom's costs but has no control over them; the post-merger arrangement will be more efficient (by reducing waste) with AT&T having control over the costs it will be paying. We also agree that efficiency is likely to improve if the management of Alascom is taken over by "the largest and most experienced interexchange carrier in the country."<sup>99</sup> These efficiencies will be passed on to consumers because AT&T/Alascom will be required to continue to provide interstate MTS/WATS to Alaska at integrated rates, to serve the Bush areas, to provide satellite services to and from the Bush areas and to make interstate access services available to all IXCs on a non-discriminatory basis. The improvements will make AT&T/Alascom a better competitor than Alascom is at present, and may stimulate further improvements by other companies in the Alaska Market, both present and future, and will have a pro-competitive effect in the Alaska market.

62 Hart-Scott-Rodino. Finally, we note that since the parties

<sup>96</sup> Section 1.65 of our Rules, 47 C.F.R. §1.65, requires Applicant to amend its Application when any "pending application is no longer substantially accurate and complete in all significant respects."

<sup>97</sup> See Section IV infra.

<sup>98</sup> See Market Structure Order, 9 FCC Rcd at 2199.

<sup>99</sup> Applicant's Reply at 9.

filed premerger notification more than 30 days ago with the Department of Justice ("DOJ") under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"),<sup>100</sup> DOJ has not made a "Second Request" for further information under 15 U.S.C. § 18A(e)<sup>101</sup> and has not challenged the proposed merger. This bolsters our conclusion that the proposed merger will not have anti-competitive effects on the whole.

## **E. Conclusion**

63 In sum, we find that the effect of the proposed merger will not substantially lessen competition, or tend to create a monopoly. We find that the acquisition, as conditioned herein will promote entry and efficiency and that it conforms to the objectives and requirements of the Joint Board's Final Recommendation as adopted in the Market Structure Order. We believe GCI's requests and concerns are answered by the present order and requirements already contained in the Market Structure Order, the Stock Purchase Agreement, our rules and the Communications Act. To facilitate efficiency by enabling AT&T and AT&T/Alascom to coordinate their operations through the use of common officers and directors, we find, pursuant to Section 212 of the Communications Act,<sup>102</sup> that AT&T and AT&T/Alascom will be under common ownership as of the effective date of this Order. We find that the present Application is complete and complies with AT&T's duty under the Market Structure Order to file a Section 214 application by March 1, 1995. We certify that the present and future public convenience and necessity require that the acquisition proposed be authorized subject to the conditions stated herein. Our determinations as to the disposition of the Alaska Spur and the Request for Review are contained in Section IV below. Given the change in circumstances brought about by the granting of Alaska Telecom's cable landing license, we believe our determinations there are consistent with the conclusions in this paragraph.

## **IV. THE APPLICATION FOR REVIEW OF THE ALASKA SPUR AUTHORIZATION**

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<sup>100</sup> Pub. L. No. 94-435, 90 Stat. 1390, codified as amended 15 U.S.C. § 18(a) (Supp. 1993).

<sup>101</sup> As provided in 15 U.S.C. § 18A(e) and elaborated in 16 C.F.R. §§ 803.20-21, the government agency reviewing the initial HSR filing may ask for more information (*i.e.*, "Second Request") if there are, or may be, potential antitrust problems with the proposed action.

<sup>102</sup> 47 U.S.C. §212.

## **A. Background**

64 The Alaska Spur Authorization authorized Alascom to operate the Alaska Spur between Alaska and Oregon.<sup>103</sup> Alascom objected to the authorization's retention of Commission jurisdiction over management of the Spur and thus rejected the Alaska Spur Authorization pending grant of the present Application for Review. The Domestic Facilities Division, Common Carrier Bureau, determined that the Alaska Spur Authorization was void and issued a Special Temporary Authorization (STA) to Alascom to operate the Spur.<sup>104</sup> Subsequently, the Commission delayed action on the Application for Review, pending determination and adoption of the recommendations of the Federal-State Joint Board.

## **B. Application**

65 In its Application for Review, Alascom objects to the following language and conditions attached to the Alaska Spur Authorization:

[T]he Commission retains jurisdiction to reallocate carriers' interest in capacity herein authorized, as the public interest may require, to accommodate additional carriers or otherwise, and, further, jurisdiction is retained by the Commission over all matters relating to the Applicant's ownership, management, maintenance, and operation of this cable as authorized herein, to assure the most efficient use of the Alaska Spur.<sup>105</sup>

66 Alascom claims that, before the Alaska Spur Authorization considered here, such jurisdiction had only been retained as a condition for international cable authorizations and is outmoded even in that context because the justifications for its inclusion are no longer valid. Alascom claims that the Commission retained jurisdiction in early international cable authorizations because federal legislation pending at the time might have required merger or restructuring of carriers and retention of jurisdiction might be necessary if the Commission were called upon to implement such requirements. Alascom also states that the early

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<sup>103</sup> Alaska Spur Authorization.

<sup>104</sup> See letter from Abraham Leib, Chief, Domestic Services Branch, Common Carrier Bureau to Charles Naftalin, Koteen & Naftalin, attorneys for Alascom, dated August 6, 1993.

<sup>105</sup> Alaska Spur Authorization, 6 FCC Rcd at 2972.



decisions retaining jurisdiction over international cable facilities<sup>106</sup> were made at a time when there was very little international cable or satellite circuitry available and after the Commission had adopted a policy, no longer in effect, requiring competing carriers to have equal numbers of circuits in satellites and undersea cables.<sup>107</sup> Alascom asserts that the second Section 214 authorization retaining jurisdiction over an international undersea cable, and the first to use language virtually identical to the language from the Alaska Spur Authorization quoted above:<sup>108</sup> (1) required a rate reduction agreed to by the carriers involved; (2) required additional proportionate loading; (3) established a "reserve pool" of circuits on the authorized facility which the Commission itself would assign to potential new entrants; and (4) expanded or altered circuit requirements among the carriers constructing the cable. According to Alascom, all these factors reflect the Commission's underlying concerns in an era when international telecommunications facilities were rare and satellite telecommunications, which were in their infancy, needed protection from undersea cable competition.<sup>109</sup>

67 Alascom asserts that these concerns no longer apply, given the present healthy competitive environment and vastly increased circuit capacity in satellite and fiber optic cable. Alascom claims that undersea fiber-optic cables have become much more common and can no longer be characterized as "bottleneck" facilities. Alascom claims that the Alaska Spur is not a "bottleneck" because it competes with extant satellite and terrestrial facilities and potential new construction not requiring international agreements. Alascom states that the Commission never intended its early retention of jurisdiction over international cable to become a general policy applicable to all future undersea cables. In one early decision, in fact, the Commission stated that future undersea 214 applications were to

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<sup>106</sup> Application for Review, at 20, citing AT&T, et al., 7 FCC 2d 959 (1967); see also AT&T, 8 FCC 2d 1007 (1967).

<sup>107</sup> Application for Review, at 20, citing ITT Cable and Radio, Inc. - Puerto Rico, 5 FCC 2d 823 (1966) (The Commission did not retain jurisdiction). The policy referred to in this paragraph is commonly called "proportionate loading." This requirement was dropped in Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, 3 FCC Rcd 2156 (1988).

<sup>108</sup> AT&T, et al., 13 FCC 2d 235 (1968).

<sup>109</sup> Application for Review at 14-22.

be considered in light of "then existing circumstances."<sup>110</sup> Alascom claims that in many subsequent cases the condition was retained routinely, without any real thought as to whether it was still necessary, and cites some recent decisions in which the Commission did not retain jurisdiction over international undersea cables.<sup>111</sup>

68 Alascom further states that it is especially inappropriate and without precedent for the Commission to retain jurisdiction over a purely domestic facility. Alascom cites a case in which the Commission contrasted its jurisdiction over domestic facilities with its absence of jurisdiction over foreign carriers and administrations as justification for retaining jurisdiction over international facilities, which were more likely to serve as "bottlenecks."<sup>112</sup> Alascom claims that the Alaska Spur is not international, connecting as it does a point in Oregon with a point in Alaska and having no direct connection with any foreign jurisdiction that would permit direct international service.<sup>113</sup> Alascom cites Section 153(e) of the Communications Act, which defines "interstate transmission" as transmission from any state to any state without regard to intervening passage through foreign territory or international waters. Alascom states that the Alaska Spur falls within this definition and, moreover, the Commission will have plenary jurisdiction over both cable landing locations.<sup>114</sup>

69 Alascom acknowledges it is already "fully subject to the Commission's authority to require reasonable access" to the Alaska Spur. Alascom states it has already given GCI the access GCI requested.<sup>115</sup> Alascom does not contest the condition that it provide "U.S. carriers... reasonable and non-discriminatory

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<sup>110</sup> Id. at 249-250.

<sup>111</sup> Application for Review at 22-29, citing e.g., American Telephone and Telegraph Company, 5 FCC Rcd 840 (1990).

<sup>112</sup> AT&T Company, 88 FCC 2d 1630 (1982).

<sup>113</sup> Application for Review at p. 2.

<sup>114</sup> Application for Review at 2. Alascom states its intention to file applications for partial assignment of the cable landing licenses in Oregon and Alaska so that Alascom may be a licensee at both landing sites, eliminating "any possible doubt that the Alaska Spur is solely a domestic facility." Application for Review at 11.

<sup>115</sup> Application for Review at 25.

access to capacity of the Alaska Spur."<sup>116</sup> Alascom does not dispute the Commission's authority to require this under the Communications Act and states the "if the condition [retention of jurisdiction] at issue was intended to do no more than restate that authority" it is unnecessary.<sup>117</sup> On the other hand, Alascom objects to the condition if it is intended to empower the Commission to "micro-manage" the Alaska Spur. Alascom states that its obligations to its shareholders do not allow it to abdicate management responsibility and suggests that GCI or others may use the condition as an excuse to repudiate or refuse to enter into contracts to purchase capacity on the Alaska Spur. "Because this condition is unexplained and unlimited, Alascom cannot accept it."<sup>118</sup>

### C. Comments

70 GCI, in its Opposition, states that the condition to which Alascom objected has been included in authorizations for domestic undersea cable. GCI lists cases in which the condition was included even where both landing sites were on United States soil and the cable at issue carried both domestic and international traffic.<sup>119</sup> GCI denies that the Alaska Spur is entirely a domestic facility since it will carry international traffic. GCI asserts that the condition was intended to favor competition and new entry in telecommunications markets by preventing "bottlenecks" and anticompetitive structures in ownership and management of undersea cables.<sup>120</sup> GCI claims that the Alaska Spur is a "bottleneck" facility because it is the only fiber-optic facility connecting Alaska to the lower 48 states and the rest of the world. GCI notes that Alascom stressed the cable's unique capabilities in its marketing literature as well as in its Section 214 Application. GCI states that it was forced to go to court to get Alascom to offer a purchase option in its present contract with GCI and that the Commission, having recognized Alascom's abuse of "bottleneck" facilities in prior decisions,<sup>121</sup>

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<sup>116</sup> Id. at 26.

<sup>117</sup> Id. at 7.

<sup>118</sup> Id.

<sup>119</sup> See e.g., American Telephone & Telegraph Co., 5 FCC Rcd 7344 (1990).

<sup>120</sup> For this proposition, GCI cites American Telephone and Telegraph Company, 88 FCC 2d 1630, 1640 (1982).

<sup>121</sup> GCI cites, inter alia, Request for Declaratory Rulings by GCI Regarding Sham Filings by Alascom, Inc., 4 FCC Rcd 7447 (1988).

is, therefore, justified in applying the condition to the Alaska Spur. GCI states that Alascom's unique position as a subsidized carrier in the Alaska market provides further justification for the condition.<sup>122</sup> GCI argues further that the pendency of the Joint Board proceeding makes the condition essential, since the Joint Board may recommend changing cable capacity requirements and the condition preserves the capacity of the Commission to implement such a recommendation. GCI claims that, without the condition, the Joint Board would certainly meet arguments from Alascom that the Commission lacks authority to ensure that Alascom provides U.S. carriers with non-discriminatory access to capacity on the Alaska Spur.<sup>123</sup>

71 Alascom, in its Reply, states that GCI already has contractual rights of access in the Alaska Spur, and has expressed complete satisfaction with its contract.<sup>124</sup> Alascom reasserts its acceptance of that part of Alaska Spur Authorization requiring Alascom to make capacity in the Alaska Spur available to present and future U.S. carriers on a reasonable and non-discriminatory basis and, therefore, denies that access is an issue. Alascom states that in every case cited by GCI in which the Commission allegedly recognized Alascom's abuse of "bottleneck facilities" the Commission, in fact, rejected claims to that effect made by GCI. Alascom states that retention of jurisdiction is unnecessary to preserve the Joint Board's authority and notes that Alascom agreed to conditioning the Alaska Spur Authorization on the outcome of the Joint Board proceeding.<sup>125</sup> Alascom states that, in the decisions cited by GCI in which the Commission retained jurisdiction over authorized cable facilities between domestic points, the facilities in question also directly connected to international points or facilities and this is not the case with the Alaska Spur. Finally, Alascom states that GCI's failure to deny in its Opposition the suggestion in Alascom's Application for Review that GCI might be planning to use the retention of jurisdiction as an excuse to repudiate its contract with Alascom is evidence

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<sup>122</sup> GCI is referring to the fact that costs of certain services provided by Alascom are paid by AT&T under the Joint Services Arrangement with AT&T. This agreement will be terminated, effective January 1, 1996, subject to certain transition mechanisms. See supra paras. 4-8.

<sup>123</sup> GCI's Opposition at 7.

<sup>124</sup> Alascom's Reply at 2. A copy of the Agreement was filed with the Commission on May 17, 1991.

<sup>125</sup> Id. at 6.

that repudiation is, in fact, GCI's intent.<sup>126</sup>

#### **D. Discussion**

72 We conclude that the cases in which the Bureau granted 214 authorization for undersea cable, varied in language because the facts of each case were different. Alascom's attempt to discern a uniform approach from the circumstances of past Commission decisions ignores the caveat quoted in AT&T, et al.,<sup>127</sup> which states in full:

[Our authorization] herein relates solely to the application before us. It is not to be construed as indicating any policy whatever with respect to the authorization of trans-oceanic cable facilities in the future. If and when applications for such facilities are filed, we will consider them on their merits in the light of then-existing circumstances.

Even though the circumstances surrounding AT&T, et al. are not identical to those surrounding the Alaska Spur Authorization, we are not precluded from retaining jurisdiction for different purposes. Foremost among the "then-existing circumstances" surrounding the Alaska Spur Authorization were proposals for restructuring the Alaska telecommunications market, the pending Joint Board recommendation with regard to that restructuring and anticipated Commission action with respect to that recommendation. The Commission expressly conditioned the Section 214 authorization for the Alaska Spur on resolution of the issues before the Joint Board. Additionally, the Commission was concerned with GCI's claim that it had been "unable to negotiate purchase of capacity [in the Spur] at rates acceptable to it."<sup>128</sup> It was in light of these concerns, that the Commission retained jurisdiction over the Alaska Spur. GCI has now purchased capacity in the Alaska Spur, and the Joint Board's recommendations, including the conditions established with respect to the Alaska Spur, have been adopted by the Commission. Under the adopted recommendations, contracts, leases, or tariffs governing use of the Alaska Spur will be submitted for Commission review to ensure that the terms and conditions offered by Alascom for use of the Alaska Spur are public and non-discriminatory. Alascom has agreed that its Section 214 authority is properly conditioned on such

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<sup>126</sup> Id. at 9.

<sup>127</sup> AT&T et al., 13 FCC 2d at 249-50.

<sup>128</sup> Alaska Spur Authorization 6 FCC Rcd at 2971.

determinations of the Joint Board proceeding.<sup>129</sup> Furthermore, as indicated above, Alascom does not object to the paragraphs retaining jurisdiction insofar as they require Alascom to provide U.S. carriers reasonable and non-discriminatory access to capacity in the Alaska Spur. Alascom acknowledges that it "is fully subject to the Commission's authority to require reasonable access."<sup>130</sup>

73 Given these factual developments, and the likely onset of competition with the grant of Alaska Telecom's cable landing license,<sup>131</sup> the specific concerns arising from the nature of the licensee that prompted the Commission to include the language in Alascom's Section 214 Authorization to which Alascom objected no longer apply. GCI is assured of its capacity in the cable since it now owns that capacity. Thus we reject GCI's argument that the Spur will function as a "bottleneck." The Alaska Spur is less likely than ever to function as a "bottleneck" because any attempt to restrict access to the Spur will be frustrated by the fact that capacity on the Spur is presently owned by Alascom's competitor, GCI, and potential competition from Alaska Telecom itself will discourage such efforts. At this time, we do not find that the public interest requires that our retention of jurisdiction over the Alaska Spur extend beyond the conditions to which Alascom has agreed and our residual jurisdiction over telecommunications established by the Communications Act. The Commission retains authority to require reasonable access to the Alaska Spur, all authority necessary to ensure that "the terms and conditions offered by Alascom for use of the Alaska Spur ... be public and non-discriminatory,"<sup>132</sup> and all authority necessary to enforce the adopted recommendations of the Joint Board.

### C. Conclusion

74 For the reasons stated, we conclude that the language retaining Commission jurisdiction over the Alaska Spur in the Alaska Spur Authorization does not, as modified above, provide the Commission with any powers other than those that Alascom has acknowledged and accepted in its Application for Review. To the extent of this clarification only, Alascom's Application for Review is granted. The Alaska Spur Authorization as clarified herein, which was "void pending further order," is hereby

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<sup>129</sup> Id. at note 8.

<sup>130</sup> Application for Review at 25.

<sup>131</sup> See supra para. 60.

<sup>132</sup> Joint Board's Final Recommendation, 9 FCC Rcd at 2217.

modified and reinstated as of the effective date of this order.<sup>133</sup>

## V. ORDERING CLAUSES

75 Accordingly, IT IS ORDERED pursuant to Sections 4(i) and (j), 214, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214, 309, 310, that the Application filed by AT&T, Pacific Telecom, Inc., and Alascom, Inc. (Applicants) in the above captioned proceeding IS GRANTED.

76 IT IS FURTHER ORDERED, pursuant to Sections 62.1-26 of the Communications Act of 1934, as amended, 47 C.F.R. §§62.1-26, that, as of the closing of the Stock Purchase Agreement dated October 1, 1994, AT&T/Alascom and AT&T Communications will be commonly owned by AT&T, so that they may share common officers and directors.

77 For good cause shown, IT IS FURTHER ORDERED, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, that Section 61.41(c) of the Commission's Rules, 47 C.F.R. §61.41(c), IS WAIVED insofar as Section 61.41(c) would otherwise require AT&T/Alascom, after closing of the Stock Purchase Agreement dated October 1, 1994, to provide services under price caps.

78 IT IS FURTHER ORDERED that all transactions between AT&T and AT&T/Alascom will be subject to the Commission's Affiliate Transaction Rules until further order of the Commission.

79 IT IS FURTHER ORDERED that AT&T is granted thirty days from the release date of this order to decline the authorization of the Application filed by AT&T, Pacific Telecom, Inc., and Alascom, Inc. Failure to respond within that period will constitute formal acceptance of this authorization.

80 IT IS ORDERED, Pursuant to 47 U.S.C. Section 154(i) and 47 U.S.C. Section 155 (c)(5), that the Application for Review filed by Alascom. Inc., IS GRANTED as indicated above.

81 IT IS FURTHER ORDERED that the Motion for Waiver of Page Limitation filed by Alascom IS GRANTED.

82 IT IS FURTHER ORDERED, that failure to notify the Commission in writing within thirty days of the release date of this Order that the Alaska Spur Authorization, as modified and reinstated herein, is unacceptable will constitute acceptance thereof. In the event of such notification, the Alaska Spur

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<sup>133</sup> See Alaska Spur Authorization, 6 FCC Rcd at 2973.

Authorization is void.

83 IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 1.103(a), this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary